BILLS AND NOTES

A VERY important addition to the textbooks on this topic is the third edition of Joseph D. Brannan's Negotiable Instruments Law, which has just been published. This annotates the statute with all the decisions through volumes of the reports which are specified in the preface, and contains very valuable discussion of ambiguous sections of the Act and of erroneous cases. It will be reviewed at length in an early issue of this REVIEW.

Interesting light on the origin of the Uniform Act is thrown by the *Central Law Journal*,[1] which reprints a circular letter sent out on August 20, 1886, by the Committee on Correspondence of the Alabama State Bar Association, suggesting uniform state legislation, beginning with the law of negotiable instruments. The letter suggested the adoption of the English Bills of Exchange Act with changes in formal matters.

During the year, no state has enacted the Negotiable Instruments Law, but it is to be hoped that it will soon be adopted by the remaining two states, Texas and Georgia. When the Act has become general law in this country, perhaps courts will take judicial notice of its existence in other states, following the excellent example of the Connecticut Supreme Court a few years ago;[2] but at present the tendency is to presume that the common law is in force until the existence of the Act is proved by evidence.[3] This odd determination of our judges to remain in official ignorance of what every lawyer knows is strikingly illustrated by a recent Indiana case,[4] which held that a note made and payable in Georgia to the order of a named payee was non-negotiable, because it was not alleged in the complaint that the Statute of Anne was adopted in Georgia, and hence it must be assumed that all promissory

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[1] 88 CENT. L. J. 329, 330 (1919), contributed by Frederick G. Bromberg, chairman of the committee mentioned.

[2] Gleason *v.* Thayer, 87 Conn. 248, 87 Atl. 790 (1913).

[3] Demelman *v.* Brazier, 193 Mass. 588, 79 N. E. 812 (1907); Bank of Laddonia *v.* Bright-Coy Commission Co., 139 Mo. App. 110, 120 S. W. 648 (1909).

[4] Crume *v.* Brightwell, 122 N. E. (Ind. App.) 230 (1919).

notes were non-negotiable as under "the customary law merchant." The same judicial trust that the common law exists everywhere led a New York judge to say of drafts governed by the laws of the Argentine Republic,[5] "Presumably those laws are in accord with the law merchant as recognized in this jurisdiction, but it may be that the law of Argentina is different from our law."

Conflict of Laws

In the New York case just cited,[6] bills were drawn upon a New York bank in Argentina by its Buenos Aires branch and delivered to the payee in good faith, but in return for money which he had obtained from various persons by fraud. The Court of Criminal Proceedings of Buenos Aires, having jurisdiction over the particular crime and the defendant, issued an order enjoining the bank from paying the drafts anywhere in the world, unless presented by *bona fide* holders for value. The bank pleaded this injunction as a defense to an action brought in New York by an indorsee, but the defense was held demurrable as not binding the plaintiff, even if not a holder for value. The defendant had leave to plead the actual facts of the alleged fraud, which the court intimated would be a good defense, but this seems doubtful in an action at law in view of the doctrine of *Prouty* v. *Roberts*,[7] which is followed in New York cases,[8] that a maker, drawer, or accepter cannot set up in a law court the equities of other persons. If, however, the defense can be raised, it would seem that the Argentina adjudication of the payee's equitable rights should be conclusive on the plaintiff if not a holder in due course, because he would be privy to the payee.

A difficult question of priority in property securing several notes is raised by a Mississippi decision.[9] A, a Louisiana corporation, made ten notes to its own order, payable in Mississippi, indorsed them in blank, and delivered them to B, a Mississippi bank, with

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[5] Scura *v.* National City Bank of New York, 107 N. Y. Misc. 93, 177 N. Y. Supp. 75, 79 (1919), per Lehman, J.

[6] See note 5, *supra*.

[7] 6 Cush. (Mass.) 19 (1850).

[8] Warren *v.* Haight, 65 N. Y. 171 (1875); City Bank *v.* Perkins, 29 N. Y. 554 (1864); Brown *v.* Penfield, 36 N. Y. 473 (1867). *Contra*, Owen *v.* Evans, 134 N. Y. 514, 31 N. E. 999 (1892). See 31 Harv. L. Rev. 1141, notes 122, 123.

[9] Couret *v.* Conner, 79 So. (Miss.) 230 (1918).

a vendor's lien and mortgage on Louisiana lands as blanket security for all ten notes. B was indebted to C, a Louisiana bank, and wrote offering to substitute some of A's notes for other collateral of B's held by C. C mailed its acceptance of this offer in New Orleans, and B accordingly sent three of A's notes without further indorsement to C, but retained the mortgage. A and B both became insolvent, and the mortgaged property was insufficient to cover all the notes. B's receivers contended that B and C should share *pro rata* in the proceeds of the land under Mississippi law, while C claimed priority under Louisiana law, by which if the holder of a claim secured by lien assigns a part of it, he will not be permitted to compete with his assignee in the proceeds of the property if insufficient to pay both in full. It was held that Louisiana law governed on the ground that the offer to give collateral was accepted there, but there is a vigorous dissent favoring the application of Mississippi law on the ground that the notes were payable in Mississippi. It would seem that Mississippi law should govern, since the *lex fori* determines questions of distribution.

A recent article in the *Central Law Journal* by O. C. Brown deals with this same question, — "Rights to Priority in Distribution of Proceeds of Mortgaged Property Among Assignees of Notes Secured by One Mortgage."[10]

Professor Ernest G. Lorenzen of Yale University has published a treatise on "The Conflict of Laws Relating to Bills and Notes, Preceded by a Comparative Study of the Law of Bills and Notes,"[11] and also an article on "Moratory Legislation Relating to Bills and Notes and the Conflict of Law."[12]

Formal Requisites of Negotiability

It is usually desirable that commercial instruments understood by business men to be negotiable should be held so by the courts. Certificates of deposit have usually been recognized as negotiable, and a recent Michigan case[13] adopts this view. The limitation,

[10] 88 Cent. L. J. 446 (June 20, 1919).

[11] New Haven: Yale University Press. 1919. pp. 337. Reviewed in 32 Harv. L. Rev. 983.

[12] 28 Yale L. J. 324–386 (February, 1919).

[13] White *v.* Wadhams, 170 N. W. (Mich.) 60 (1918); noted in 17 Mich. L. Rev. 419.

"subject to the rules of the savings department," was held not to render the promise payable out of a particular savings department fund or otherwise conditional. The Uniform Acts as to bills of lading and warehouse receipts have made those documents negotiable, though not payable in money, and a similar statutory extension has been made in Kentucky as to tobacco warehouse receipts. Such instruments are not, however, within the Negotiable Instruments Law.[14]

A bill or note must be unconditional, and it is often difficult to determine whether a memorandum on the instrument constitutes a condition. A note, otherwise unobjectionable, stated that it was given to reimburse the payee for a specified certificate of deposit maturing with the note. The Supreme Court of Alabama[15] held that this made the payment of the note conditional on the payment of the certificate of deposit. Three out of seven judges dissented, on the ground that there was only "a statement of the transaction which gives rise to the instrument" under section 3, subsection 2 of the Negotiable Instruments Law. It has been suggested[16] that this same subsection of the Act validates chattel notes, which provide that the title of a chattel shall remain in the payee until payment, and this view is taken by a recent case in Oklahoma.[17] Probably, however, a state like Massachusetts, which held chattel notes conditional at common law,[18] would not regard this clause of the Uniform Act as sufficiently specific to change the local law.

A negotiable instrument must be payable in money, for since it is intended to serve as a substitute for money, the holder must be able at maturity to convert it into a medium of exchange with which he can go at once into shops or elsewhere and buy what he wishes. It is obvious that an instrument payable in goods would

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14 Kirkpatrick *v.* Lebus, 211 S. W. (Ky. App.) 572 (1919), construing KY. STAT., section 4814 a, subsection 3. Vannett *v.* Reilly-Herz Automobile Co., 173 N. W. (N. D.) 466 (1919).

15 Sacred Heart Church Building Committee *v.* Manson, 82 So. (Ala.) 498 (1919). One of the majority concurred partly on the ground that the plaintiff was not a holder in due course even if the note was negotiable.

16 By Judge Lyman D. Brewster. See his article in BRANNAN'S NEGOTIABLE INSTRUMENTS, 3 ed., 437, and comments by Dean Ames and Charles L. McKeehan, on pages 421, 447, 477.

17 Welch *v.* Owenby, 175 Pac. (Okla.) 746 (1918).

18 Sloan *v.* McCarty, 134 Mass. 245 (1883).

not have that advantage, although persons might be found who would be willing to accept the goods in barter for commodities or services. In the same way, an instrument payable in foreign coin is not negotiable,[19] although some persons might consent to take it in payment. However, it is immaterial that the money is foreign at the forum or the place of making if it circulates as legal tender or with equivalent freedom at the place of payment.[20] Foreign paper money, in which a government promises its own coin to pay bearer in its own country, falls within the same principle, and has recently been held negotiable in New York.[21] The decision goes largely on the unnecessary and incorrect ground that foreign money is money in this country. The limited and uncertain willingness to receive it takes it out of that category. An interesting question arises — Is foreign specie, though neither money nor negotiable paper, a chattel current, so that a *bona fide* purchaser thereof from a thief will be protected? The New York case so holds, and this seems correct. It is probable that coins cease to be current when they no longer circulate anywhere, and that the *bona fide* purchaser of a Cyzicene stater on an Attic obolus would be obliged to return it to the victim of theft.

Certainty of time is clearly violated by a note reading "One day after date I promise to pay . . . to be paid at my death."[22] It has been suggested[23] that the note might have been construed as valid by the insertion of "or," but such a method would throw commercial paper into the vague realm of testamentary interpretation, and mislead prospective purchasers into buying freak instruments with the hope of a liberal judicial construction which might not be given. Whatever the hardship in individual cases it is much more just in the end to brand all uncertain instruments as bad. Furthermore, a note payable "one day after date or at my death" is also uncertain,[24] for which is its maturity for purposes of presentment and notice, letting in equities, etc.?

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[19] Thompson *v.* Sloan, 23 Wend. (N. Y.) 71 (1840); *contra*, St. Stephen Branch Ry. Co. *v.* Black, 2 Hannay (N. B.), 139 (1870); Hogue *v.* Williamson, 85 Tex. 553, 22 S. W. 580 (1893).

[20] Black *v.* Ward, 27 Mich. 191 (1873).

[21] Brown *v.* Perera, 176 N. Y. Supp. 215 (1918).

[22] Zimmerman *v.* Zimmerman, 262 Pa. 540, 106 Atl. 198 (1919).

[23] In 17 MICH. L. REV. 702 (1919).

[24] Such a note was, however, held negotiable in Conn *v.* Thornton, 46 Ala. 587 (1871).

The most unsettled portion of the law of formal requisites relates to acceleration provisions in time paper by which maturity is hastened by some specified contingency. A recent article on this topic[25] takes the position that such provisions do not impair negotiability if there is an ultimate definite maturity and payment can be accelerated only by the performance of an act regularly incident to the collection of the paper. This view may be illustrated by several late cases. A note payable "on demand . . . or at the settlement of my mother's estate" is not negotiable, since the ultimate maturity, the settlement, is not definite.[26] On the other hand, bonds payable February 1, 1952, which may become due at once in the option of the bondholders upon default in the payment of interest are held negotiable.[27] It is worth noting that § 2(3) of the Negotiable Instruments Law validates installment instruments accelerated by default of interest, but does not specifically mention such provisions in non-installment instruments. Yet the Supreme Court of California[28] has taken advantage of the Act to hold an instrument with such a provision negotiable, and has declared its intention to disregard decisions under the California Code which took a hostile attitude toward acceleration provisions in general.[29] Another important decision in Oregon[30] holds negotiable a note payable in five years, "due if ranch is sold or mortgaged." This is construed to give the holder an option to accelerate if the contingency occurs. The court distinguished earlier Oregon cases[31] of chattel notes, declared non-negotiable because of a provision for acceleration "if the holder deems himself insecure,"[32] on the ground that the acceleration

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[25] "Acceleration Provisions in Time Paper," Z. Chafee, Jr.. 32 HARV. L. REV. 747 (1919).

[26] McQuesten *v.* Spalding, 120 N. E. (Mass.) 850 (1918).

[27] Higgins *v.* Hocking Valley Ry. Co., 177 N. Y. Supp. 444, 452 (1919).

[28] Utah State Nat. Bank *v.* Smith, 179 Pac. (Cal.) 160 (1919). See 7 CAL. L. REV. 263 (1919), which interprets the case as forecasting a liberal construction of the California Negotiable Instruments Law, although the court is construing the Utah Uniform Act.

[29] An example of the narrow view is Crocker National Bank *v.* Byrne, 173 Pac. (Cal.) 752 (1918). See 6 CAL. L. REV. 444 (1918). A more recent case is Mathews *v.* Wilson, 175 Pac. 647 (Cal. App. 1918).

[30] Nickell *v.* Bradshaw, 183 Pac. (Ore.) 12 (1919).

[31] Reynolds *v.* Vint, 73 Ore. 528, 144 Pac. 526 (1914); Western Farquhar Machinery Co. *v.* Burnett, 82 Ore. 174, 161 Pac. 384 (1916).

[32] See an argument for the negotiability of such notes in 32 HARV. L. REV. 773-777.

clauses were there "entirely under the control of the holder and completely dependent upon his whim or caprice independent of any act of the maker."[33] This justification of the earlier cases does not seem valid, since an ordinary demand note is even more under the control of the holder and yet is negotiable. It is to be hoped that the recent decisions mark a more liberal attitude in the West toward acceleration provisions.

Other decisions support the views of the article just mentioned,[34] that a purchaser who knows that an act of acceleration has taken place is a purchaser of dishonored paper subject to equities;[35] that one who is ignorant of such act is a holder in due course if he buys before the ultimate maturity;[36] and that in the absence of acceleration the Statute of Limitations runs from the ultimate maturity.[37] The statement, frequent in acceleration instruments, that certain collateral is pledged for the payment of the particular note and all other liabilities, is properly held in a Louisiana case not to impair negotiability.[38] Dawkins, J., summed up this whole topic well:

> "The tendency of modern jurisprudence is to get away from the rigid rules of interpretation which seem to have prevailed when the famous expression of Chief Justice Gibson that 'a negotiable bill or note is a courier without luggage' — was coined. The law of negotiable instruments, as a part of the law merchant, is based upon the necessities, usages, and customs of business, and must develop with it. Whenever the additional stipulations are merely in aid of the collection of the note, and do not constitute an undertaking to give or do something else foreign to that end, they do not destroy negotiability."

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[33] Nickell *v.* Bradshaw, 183 Pac. (Ore.) 12, 18 (1919).

[34] See 32 HARV. L. REV. 747, 757, and *passim*.

[35] Marion Nat. Bank *v.* Harden, 97 S. E. (W. Va.) 600 (1918), series of notes. See 32 HARV. L. REV. 764–770.

[36] Citizens' Nat. Bank of Glenwood Springs *v.* First Nat. Bank of Portland, Ore., 182 Pac. (Colo.) 12 (1919), unknown dishonor of check. See 32 HARV. L. REV. 761.

[37] McCarty-Goodsman, 167 N. W. (N. D.) 503 (1918), series of notes, annotated in L. R. A. 1918 F, 169; McQuesten *v.* Spalding, 120 N. E. (Mass.) 850 (1918), due at a time accrued or on demand. See also Gaston *v.* Boston Penny Savings Bank, 123 N. E. (Mass.) 101 (1919), as to liability for interest accruing after the act of acceleration.

[38] Farmers' & Merchants' Bank *v.* Davies, 80 So. (La.) 713 (1919), not an acceleration case. See 32 HARV. L. REV. 780. *Cf.* Hibernia Bank *v.* Dresser, 132 La. 532, 543, 61 So. 561 (1913).

Additional references to recent annotations on formal requisites are given in a footnote.[39]

Liability of Indorsers

The great diversity of rules at common law as to the obligation of an anomalous indorser was supposedly ended by the Negotiable Instruments Law.[40] Nevertheless, some jurisdictions[41] have thrown the law back into its old confusion by treating the Act as stating only a presumptive liability, which can be rebutted by parol evidence that the indorser intended to be liable in the same capacity as he used to be at common law in that locality. Thus Alabama has lately impaired the uniformity of the Act by holding the indorser a co-maker.[42] However, Michigan has refused to vary the obligation of the Act by parol evidence which was offered to prove that the indorser was not to be liable at all,[43] and Illinois[44] and Missouri[45] show a strong inclination toward the rejection of extrinsic proof.

Notice of dishonor need not be given to an accommodated indorser, but if two men buy a chattel, and one of them makes a note which the other indorses, the latter is not accommodated;[46] and there is no presumption that an officer of a corporation who indorses a note made by it is accommodated.[47] The question to whom notice of protest or of dishonor should be given in the event of the party entitled thereto has lately been annotated.[48]

The extent of the liability of an indorser without recourse has been recently discussed,[49] and it has been held that an indorser

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[39] Negotiability as affected by provision in relation to interest or discount, 2 A. L. R. 139; 87 Cent. L. J. 339. Validity of instrument for payment of money as affected by mere fact that payment is postponed until death, 2 A. L. R. 1471.

[40] §§ 63, 64.

[41] Haddock, Blanchard & Co. *v.* Haddock, 192 N. Y. 499, 85 N. E. 682 (1908); Hunter *v.* Harris, 63 Ore. 505, 127 Pac. 786 (1912); Mercantile Bank of Memphis *v.* Busby, 120 Tenn. 652, 113 S. W. 390 (1908).

[42] Long *v.* Gwin, 80 So. (Ala.) 440 (1918).

[43] Cooper *v.* Sonk, 201 Mich. 655, 167 N. W. 842 (1918); annotated in 87 Cent. L. J. 119; 28 Yale L. J. 187.

[44] Tucker *v.* Mueller, 287 Ill. 551, 122 N. E. 847 (1919).

[45] Overland Auto Co. *v.* Winters, 210 S. W. (Mo.) 1 (1919); *accord*, Stephens *v.* Bowles, 206 S. W. (Mo. App.) 589 (1918).

[46] Tucker *v.* Mueller, *supra*, note 44.

[47] Overland Auto Co. *v.* Winters, *supra*, note 45.

[48] 1 A. L. R. 474.

[49] 29 Yale L. J. 102; 2 A. L. R. 216.

"without recourse in any way" nevertheless warrants the maker's signature to be genuine,[50] a result seriously open to question.

TRANSFER OF LEGAL TITLE

The natural inference from the language of a negotiable instrument is that any person within the terms of the promise or order is owner thereof. Hence, if the promise runs to bearer, any bearer would seem to be the promisee, however bad his moral character. If this view be right, notwithstanding frequent statements to the contrary in cases and textbooks, a thief may have legal title.[51] A Massachusetts case tends to support this proposition. Bonds were stolen and delivered to innocent brokers, who sold them and paid over the proceeds to the thief. The brokers were held not to be liable to the former owner for conversion.[52] If the thief has merely a power to give title to a *bona fide* purchaser, it is hard to see why the brokers should have been protected, any more than if they had made a similar sale of a stolen chattel.[53] They themselves could not claim immunity as holders in due course. It is true that the former owner's right to recover the bonds was here cut off by a purchase in good faith, but it is not likely that the result would have been different if the brokers had sold to a buyer who had notice of the theft.

A dummy indorsee is a common device to avoid publicity in litigation for the real owner. He clearly has legal title, and is usually held entitled to sue even in code states.[54] A lower New York case seems wrong in holding that he is neither a real party in interest nor an express trustee.[55] Conversely, one who is not within the description of the instrument should not be allowed to sue. Yet a plaintiff who paid value for a negotiable note, payable to a third party, to whom the plaintiff expected to negotiate it

[50] Miller *v.* Stewart, 214 S. W. (Tex. Civ. App.) 565 (1919), not N. I. L. See also Schmidt *v.* Pegg, 172 Mich. 159, 137 N. W. 524 (1912).

[51] See "Rights in Overdue Paper," Z. Chafee, Jr., 31 HARV. L. REV. 1104. An instance of the contrary view is Brown *v.* Perera, 176 N. Y. Supp. 215 (1918).

[52] Pratt *v.* Higginson, 230 Mass. 256, 119 N. E. 661 (1918). See 28 YALE L. J. 175. *Accord*, Spooner *v.* 8 Holmes, 102 Mass. 503 (1869).

[53] Coles *v.* Clark, 3 Cush. 399 Mass. (1849); see also 50 L. R. A. (N. S.) 52, note.

[54] 1 AMES, CASES ON BILLS AND NOTES, 323, 324.

[55] Clark *v.* Dada, 183 App. Div. 253, 171 N. Y. Supp. 205 (1918).

but failed, was allowed to recover from the maker on the note.[56] An action in money had and received was the only proper remedy.

Defenses

It has already been stated[57] that a defendant in an action at law on a negotiable instrument should not be allowed to set up the equity of another person. He should either get express authority from that person to defend in his behalf, or else interplead that person and the plaintiff, as in *Bathgate* v. *Exchange Bank of Chula*,[58] which held that the drawee bank of a check certified by the drawer and delivered in pursuance of an executory contract could interplead drawer and payee, after a dispute had arisen between them as to faithful performance of the contract.

Real defenses are nowhere mentioned or provided for in the Negotiable Instruments Law. Section 57, in making the holder in due course "free from any defect of title in prior parties," might be held to abolish real defenses. Since "illegality" is specifically stated in section 55 to be a defect of title, there is a strong argument that statutes making instruments void for usury and gaming are impliedly repealed by the Uniform Act.[59] The weight of authority, however, holds that those statutes are still in effect, and New York has been added to the jurisdictions so holding.[60] Collin, J., contends that the legislature did not intend by a commercial act to repeal criminal penalties, and that the usurious instrument is not a negotiable instrument at all, so that it is not affected by the Negotiable Instruments Law. This last point is not wholly sound, for an indorser of such an instrument is clearly within the Act. The first point has more force. It may also be urged that there is here not merely a defect of title, but no title at all. If the majority view is correct, an express repeal of these real defenses is desirable, for usury and gaming are not sufficiently dangerous to society to

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[56] Sutherland State Bank *v.* Dial, 170 N. W. (Neb.) 666 (1919); see 28 Yale L. J. 695 in support of the case.

[57] Page 256, *supra*.

[58] 205 S. W. (Mo. App.) 875 (1918).

[59] See Brannan's Negotiable Instruments Law, 3 ed., 184.

[60] Sabine *v.* Paine, 223 N. Y. 401, 119 N. E. 849 (1918), annotated in 28 Yale L. J. 85, 4 Cornell L. Q. 44. *Quaere* on same point, Stevens *v.* Freund, 171 N. W. (Wis.) 300 (1919).

make it necessary to allow defendants who actually participated in the crime to avoid paying innocent purchasers for value.

Consideration is presumed from the execution of a bill or note, but want of consideration is an equitable defense. The requirements of consideration are, however, less rigid than in a simple contract. Thus an ordinary promise in writing to pay the antecedent debt of another would be unenforceable, but a time note has been held binding, though the only consideration besides such a debt is the vague agreement of the payee to extend credit.[61] A stricter view is taken in a Minnesota case,[62] in which an advance of money to the maker was held insufficient consideration for time notes covering both the advance and an antecedent debt of the maker's son. In any case, the actual discharge of the antecedent debt by the new obligation is good consideration.[63]

Absence of consideration was not allowed as a defense to a receiver's suit on a note delivered gratuitously to a bank as payee for the purpose of deceiving the bank examiner.[64] Because of public policy the maker must perform his obligation, just as in other cases public policy is a reason for non-performance.

The serious risk run by an agent in signing a note on behalf of his principal is shown by *Schuling* v. *Erwin*.[65] A note was signed "Trustees of the Second Christian Church, A, B Chairman, C." The church, which was incorporated, authorized the note and used the money for a building. The plaintiff sued the church at maturity, got judgment, but collected very little. It was held, with dissent, that the trustees were personally liable, under section 20 of the Negotiable Instruments Law, on the ground that they signed "without disclosing their principal." Yet the principal is plainly the church, and the instrument certainly fulfills the requirement of section 20, "Where a person adds . . . words indicating that he signs . . . in a representative capacity, he is not liable on the instrument if he was duly authorized." The decision is one more example of what Mr. Brannan calls "the unnecessary and unpardonable confusion caused by the failure of some of the courts

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61 American Brass & Copper Co. *v.* Pine, 173 N. Y. Supp. 147 (1918).

62 Luing *v.* Peterson, 172 N. W. (Minn.) 692 (1919), noted in 29 YALE L. J. 116.

63 Howard *v.* Rhodes, 81 So. (Ala. App.) 362 (1918).

64 Niblack *v.* Farley, 122 N. E. (Ill.) 160 (1919).

65 169 N. W. (Iowa) 686 (1918); criticized adversely in 28 YALE L. J. 613.

to exercise a little common sense and to recognize mercantile usage." [66]

After the existence of a defense is discovered by the maker, what steps must he take to preserve it? If he gives a renewal note after learning that the payee's representations in obtaining the original note were fraudulent, he is held to be precluded from setting up the fraud.[67] On the other hand, he may safely continue to pay interest, according to an Iowa case,[68] which contains an extensive discussion of waiver. In this case there is said to be neither waiver nor estoppel, for the maker does not intend to abandon his right and does not lull the payee into security. However, the payment of coupons on a twenty-year bond with knowledge of a defense might well bar the maker from setting it up at maturity even against a holder with notice, who was thus misled into purchasing.

Fictitious Payees, Alteration, Forgery

Frauds of this type may be set up as defenses or as a basis for affirmative relief, so that it is convenient to group them separately.

Under section 9 (3) of the Negotiable Instruments Law an instrument is payable to bearer if "payable to a fictitious or non-existing person and such fact was known to the person making it so payable." The final clause raises at least two difficulties. Must the knowledge be actual or may it be imputed? Certainly if the drawer or maker is a corporation, it cannot be actual, and the intention of the agent who signs the instrument to pick out a fictitious payee is decisive.[69] Doubtless, the same principle would govern if the agent signed on behalf of a natural employer. Is the intention of any agent other than the actual signer significant? In *Robertson* v. *Brasfield*[70] a loan broker applied to the plaintiff for a loan to D. W. Johnson, a non-existent person, as the broker alone knew. The plaintiff agreed to make the loan through the broker, who had

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66 Brannan's Negotiable Instruments Law, 3 ed., 70 *ff.*, citing cases *contra* to Schuling *v.* Ervin, such as Jump *v.* Sparling, 218 Mass. 324, 105 N. E. 878 (1914).

67 Enslen *v.* Mechanics & Metals Nat. Bank of New York, 255 Fed. 527 (C. C. A., 5th, 1919).

68 Ford *v.* Ott, 173 N. W. (Iowa) 121 (1919). Whether waiver exists is doubtful. See Waiver Distributed, John S. Ewart, Cambridge, Harvard Univ. Press, 1917.

69 Snyder *v.* Corn. Exchange National Bank, 221 Pa. 599, 70 Atl. 876 (1908).

70 79 So. (Ala.) 651 (1918).

represented him in several previous loans, and sent him a check to Johnson's order on receipt of a mortgage and notes purporting to be signed by Johnson. The broker indorsed the check and the drawee paid it. The plaintiff now sues the drawee to recover his deposit. The defendant contended that the broker was the plaintiff's agent so as to make the principal chargeable with his knowledge; but the majority held otherwise, on the ground that the broker was acting fraudulently and knew the fact before the agency began, even if he was the plaintiff's agent. The plaintiff accordingly recovered, one judge dissenting. A second difficulty is, who is the person who makes the instrument payable to a payee, — the clerk who after investigating the creditors of a corporation and the amount due them prepares the checks, or the treasurer who goes through the mechanical task of signing his name, trusting in the honesty of the clerk for all essential details? The better view would seem to be that the signer does after all create the instrument and should determine who owns it,[71] and that any attempt to decide how far the treasurer uses his mind in examining the payee's name on a check and how far he uses his hand only would lead to endless fine distinctions. There is, however, some authority the other way, in a New York case where the check was mailed to the fictitious payee and reached the clerk who had hired a letter-box in the false name.[72] The conflict is reflected in three recent decisions in lower New York courts,[73] each with a dissenting opinion. If the fictitious name is filled in by the clerk in a blank check delivered to him by the depositor, the check is of course payable to bearer, since the clerk has been empowered to complete it.[74]

A material alteration avoids an instrument.[75] An erasure of a statement of the transaction giving rise to the instrument is not

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[71] Jordan Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 87 N. E. 740 (1909).

[72] Hartford *v.* Greenwich Bank, 157 App. Div. 448, 142 N. Y. Supp. 387, 2 JJ. diss. (1913); aff'd by memo, 215 N. Y. 726, 109 N. E. 1077 (1915); called "a border line case" in United Cigar Stores Co. *v.* Am. Raw Silk Co., *infra.*

[73] Not payable to bearer — United Cigar Stores Co. *v.* Am. Raw Silk Co., 184 App. Div. 217, 171 N. Y. Supp. 480 (1918); National Surety Co. *v.* National City Bank of Brooklyn, 184 App. Div. 771, 172 N. Y. Supp. 413 (1918). Payable to bearer — P. & G. Card & Paper Co. *v.* Fifth Nat. Bank, 172 N. Y. Supp. 688 (1918).

[74] Edelen *v.* Oakland Bank of Savings, 178 Pac. (Cal. App.) 737 (1918).

[75] N. I. L. § 124.

material,[76] since it does not affect the obligation as a condition or otherwise. Adding a party to the instrument is clearly material under section 125 of the Act,[77] although there was a conflict at common law.[78] Although the Act allows "a holder in due course, not a party to the alteration," [79] to recover according to the original tenor of the instrument, a person who altered the instrument innocently would seem to fall outside this protection, in spite of the fact that he could recover at American common law.[80] An Oregon case,[81] however, takes the position that the payee making such an alteration can surrender the note and sue upon the original debt. Another problem under this clause is the liability of an accommodation indorser if the instrument was altered by the maker before delivery to the payee. It has been held that he is not liable at all since there was no "original tenor" when there was no enforceable obligation.[82] Opposing decisions have more justly construed "original tenor" as meaning original form, and compelled him to pay accordingly.[83] In a recent South Carolina case [84] the maker's agent could not get the original payee to discount the note, and substituted the name of the plaintiff, who discounted it. The court assumed for the purposes of the case that the plaintiff was a holder in due course, although inclined to believe that the apparent nature of the alteration prevented this, and held that he could not enforce the note according to the original tenor, since the plaintiff would have no title to the note as it first read, and the alteration "deprived the contract of all legal validity in its inception." It is not necessary to agree with this last reason in order to regard the decision as right on the facts, for the plaintiff

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[76] Mason *v.* Shaffer, 96 S. E. (W. Va.) 1023 (1918).

[77] Bank of Commerce of Sulphur, Oklahoma *v.* Webster, 172 Pac. 942 (1918).

[78] See note in L. R. A. 1918 F, 698.

[79] N. I. L. § 124.

[80] BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., 338, citing some cases *contra:* Donneybrook State Bank *v.* Corbett, 37 N. D. 87, 163 N. W. 275 (1917); Jeffrey *v.* Rosenfeld, 179 Mass. 506, 61 N. E. 49 (1901); Edington *v.* McLeod, 87 Kan. 426, 124 Pac. 163 (1912).

[81] Catching *v.* Ruby, 178 Pac. (Ore.) 796 (1919).

[82] First Nat. Bank *v.* Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445 (1906).

[83] Thorpe *v.* White, 188 Mass. 333, 74 N. E. 592 (1905); Packard *v.* Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666 (1903), *semble,* aff'd without opinion, 180 N. Y. 549, 73 N. E. 1129 (1905).

[84] Muse *v.* Clark, 98 S. E. (S. C.) 850 (1919).

was not within the description of the original instrument and so could not enforce it.

A bank which pays an altered check cannot ordinarily charge the depositor's account, except according to the original tenor of the instrument, because it has not performed his order.[85] The doctrine of the early English case of *Young* v. *Grote*,[86] that the depositor must stand the loss when the alteration was caused by his negligence, has been adopted by the House of Lords in a recent decision already discussed in this REVIEW.[87] Although the Judicial Committee of the Privy Council had previously denied that such was the law of the British Empire,[88] that body is not bound to follow its own decisions[89] and will probably reverse itself at the first opportunity. The doctrine of *Young* v. *Grote* is also law in many American jurisdictions,[90] and is extended to the depositor's negligent failure to examine his bank balances and thus discover the fraudulent alteration.[91] Some states recognize a general duty of care of one signing negotiable paper toward all persons having business dealings with the instrument, and not merely a special duty between depositor and bank. Thus one who signs a note supposing it is a different kind of document is ordinarily not liable,[92] but if he fails to read it he may be held.[93] This question of fraud preventing the inception of contract is discussed in a recent issue of the *Columbia Law Review*.[94]

If an indorsement of a check to a collecting bank is forged or made by an agent of the true owner without authority, the bank is wrongfully dealing with the check and should be liable to the

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85 For a recent case, see East St. Louis Cotton Co. *v.* Bank of Steele, 205 S. W. (Mo. App.) 96 (1918).

86 4 Bing. 253 (1827).

87 London Joint Stock Bank, Ltd., *v.* Macmillan, [1918] A. C. 777, noted in 31 HARV. L. REV. 779, 145 L. T. 208, 35 L. QUART. REV. 5. See also 28 YALE L. J. 414, 17 MICH. L. REV. 427; 4 CORNELL L. Q. 46.

88 Marshall *v.* Colonial Bank of Australia, Ltd., [1906] A. C. 559 (J. C.).

89 Tooth *v.* Power, [1891] A. C. 284, 292 (J. C.); Ridsdale *v.* Clifton, 2 P. D. 276, 306 (J. C. 1877).

90 31 HARV. L. REV. 779.

91 California Vegetable Union *v.* Crocker National Bank, 174 Pac. (Cal.) 920 (1918), noted in 32 HARV. L. REV. 287.

92 Foster *v.* MacKinnon, L. R. 4 C. P. 704 (1869).

93 Twyman *v.* Avera Loan & Investment Co., 98 S. E. (Ga. App.) 239 (1918), is a recent instance.

94 19 COL. L. REV. 145 (April, 1919).

true owner as a converter. The true owner may also, as in a recent Arkansas case,[95] ratify the collection, and sue the bank for money had and received to his use. The drawee bank which pays the check should also be liable to the true owner [96] as a converter, though some decisions go on the ground that the improper payment is equivalent to acceptance. A strong minority denies recovery on the ground that there is no acceptance written on the instrument and no privity otherwise between the parties. Another Arkansas case [97] has taken this view and distinguished the drawee from the collecting bank.

The right to recover money paid on forged instruments on the ground of mistake is a battle-ground of the law. The famous doctrine of *Price* v. *Neal*,[98] that the drawer cannot recover money paid on a forged drawer's signature, has been adopted in most states, though usually on grounds different from those put forward by Dean Ames,[99] and is often stated to be codified by section 62 of the Negotiable Instruments Law, which says that "the acceptor by accepting . . . admits the existence of the drawer, the genuineness of his signature." South Dakota, however, which rejected *Price* v. *Neal* at common law, has refused to follow it under the Uniform Act, pointing out with much force that payment is not "accepting." [100] A more specific statute seems necessary to impose the doctrine upon an unwilling jurisdiction.

If the drawee pays a bill of exchange in itself genuine but secured by a forged bill of lading, he cannot recover, and the English Court of Appeal has decided in *Guaranty Trust Co.* v. *Hannay* [101] that a reference in the bill of exchange to the goods does not alter this result in either English or American law. The case was discussed in a recent number of this REVIEW.[102] Although the

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[95] Schaap *v.* State Nat. Bank of Texarkana, 208 S. W. (Ark.) 309 (1918). Other cases are collected in the opinion and in BRADY ON CHECKS, §§ 138–140. *Contra*, Tibby Bros. Glass Co. *v.* Farmers' & Mechanics' Bank, 220 Pa. 1, 69 Atl. 280 (1908).

[96] BRADY ON CHECKS, § 136, collects the authorities for and against liability.

[97] State, for use of Arkansas Penitentiary *v.* Bank of Commerce, 202 S. W. (Ark.) 834 (1918).

[98] 3 Burr. 1354 (1762).

[99] In 4 HARV. L. REV. 297.

[100] First Nat. Bank of Pukwana *v.* Brule Nat. Bank of Chamberlain, 168 N. W. (S. D.) 1054 (1918).

[101] (1918) 2 K. B. 623 (C. A.).

[102] 32 HARV. L. REV. 560. See also 35 L. QUART. REV. 124; 18 COL. L. REV. 480; 27 YALE L. J. 1046, 1077; Hannay *v.* Guaranty Trust Co., 187 Fed. 686 (1911).

United States District Court of Southern New York had decided differently in the same litigation, the Circuit Court of Appeals in the Fifth Circuit follows the English case in a suit involving a bill which reads "charge the same to account of against 214 B/C." *i.e.* bales of cotton.[103]

Holder in Due Course

By section 52 of the Act a holder in due course must satisfy four requirements. First, he must have bought the instrument when it was complete and regular upon its face. He is not, however, prevented from recovering by the previous existence of blank spaces unknown to him, which have since been filled in.[104] The payee seems a holder in due course in such a situation and should be protected as much as an indorsee. Pennsylvania has recently so held[105] in accordance with the weight of authority.[106] In *National Bank of San Mateo* v. *Whitney*,[107] A, who was about to enter a hospital, left in the hands of the cashier of a bank, through whom previous loans had been negotiated, a blank note to be filled in by the cashier upon the order of A or his brother, then to be charged to A's account and the proceeds applied to the credit of a corporation, of which A and his brother were officers. A few days later, without any instructions, the cashier filled in the blanks for $3,000, placed the note in the bank's files, and caused it to be charged to A's personal account, taking in return $3,000 in cash from the bank's funds, which he misappropriated. It was held that the bank could not recover from A, on the grounds that there was no delivery by A so as to authorize the blanks to be filled, and that the bank had notice of the fraud through the cashier, its agent. The second ground alone seems correct.[108] If the bank had indorsed the note for value to an innocent purchaser, he should have been able to recover.

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[103] Hubbard Bros. & Co. *v.* Southern Pac. Co., 256 Fed. 761 (1919).

[104] See notes in L. R. A. 1918 D, 1064, 1918 E, 1042.

[105] Johnston *v.* Knipe, 260 Pa. 504, 103 Atl. 957 (1918); noted in 32 Harv. L. Rev. 855, and 28 Yale L. J. 197.

[106] See Brannan's Negotiable Instruments Law, 3 ed., references indexed *sub* "Payee, whether holder in due course."

[107] 180 Pac. (Cal. App.) 845 (1919).

[108] Other cases on imputed notice are State Bank of Morton *v.* Adams, 170 N. W. (Minn.) 925 (1919), and Coleman *v.* Shortsville Wheel Co., 257 Fed. 591 (W. D. N. Y. 1919).

On the requirement of value an important case is *Kelso* v. *Ellis*.[109] B, who dealt in advertising specialties, furnished A, a merchant, with the scheme for a piano contest among A's customers and agreed to deliver a piano which would serve as prize. A gave negotiable promissory notes to B. B sent an order for the piano to C, a manufacturer, who had shipped several pianos to merchants on his account for similar contests and had received from him notes of merchants in payment. As B owed C $2,000 for former pianos, C did not ship any to A. A few days later B transferred A's notes to C, which credited them on B's general account as cash. C had no actual knowledge of the terms of the contract between A and B, but knew in general that B was engaged in the piano-contest business. C now sues A, who sets up want of value and good faith. The lower court directed a verdict for C. Pound, J., stated that A had a defense against B of partial failure of consideration. "The contest without a piano was like the play of Hamlet with the part of Hamlet left out." He held that C paid value but had notice, and ordered a new trial.

The point as to value was governed by section 25 of the Negotiable Instruments Law, "An antecedent or pre-existing debt constitutes value." New York had held at common law with several other jurisdictions that an instrument taken as collateral security for an antecedent debt or in conditional payment thereof was not taken for value, although absolute discharge of an antecedent debt constituted value. It was generally supposed that the Act abolished this minority rule, and several states formerly adopting it have now held that all transfers for an antecedent debt are for value.[110] However, many cases in the lower New York courts continued to apply the New York common-law rule.[111] It is possible to reconcile the holding of *Kelso* v. *Ellis* with these cases if the payment was absolute, although it was probably conditional, and it is certainly true that the question of security for an antecedent debt was not involved. But the opinion of Pound, J., shows that the Court of Appeals regards the old New York law as entirely abrogated by the Act.[112]

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[109] 224 N. Y. 528, 121 N. E. 364 (1918), noted in 19 Col. L. Rev. 218, 28 Yale L. J. 692.

[110] See 19 Col. L. Rev. 219.

[111] Brannan's Negotiable Instruments Law, 3 ed., 104, 105.

[112] 224 N. Y. 528, 121 N. E. 364, 366.

"The New York rule was so well established that the inertia of *Coddington* v. *Bay*[113] carried it along for some distance before the external force of the Negotiable Instruments Law acted upon it. . . . Even in this court a *dictum*[114] . . . reveals the habit of bench and bar to look to cases rather than statutes for principles of commercial law until attention is sharply directed to the extent that the movement for uniformity of laws through legislation has been successful in New York and many other states. But it is perfectly clear that for the sake of uniformity New York has abrogated the rule which had been in force since the year 1822.[115] . . . *Coddington* v. *Bay* and section 51[116] of the Negotiable Instruments Law are irreconcilable in the mind of any candid student of the decisions in this and other jurisdictions."

The question of notice is also raised by *Kelso* v. *Ellis*.[117] The court held that there was evidence to go to the jury on this point. It is true that knowledge of an executory contract between the maker and the payee does not *per se* put an indorsee on inquiry of a possible breach,[118] and that ordinarily with negotiable paper actual bad faith is necessary and not merely knowledge of facts which would cause suspicion in a reasonable man.[119] But "knowledge of such facts that his action in taking the instrument amounted to bad faith" constitutes notice;[120] for instance, knowledge of trouble in collecting previous paper of the same parties.[121] It would even seem that notice may be conclusively presumed from knowledge of certain facts within standardized limits which the courts have held to constitute constructive notice despite the absence of bad faith; for instance, when a partnership is the indorser of a note pledged for a personal debt of a partner, accommodation is shown, and similar problems arise with corporation paper.[122]

113 20 Johns. (N. Y.) 637 (1822).

114 Bank of America *v.* Waydell, 187 N. Y. 115, 120, 79 N. E. 857 (1907).

115 Citing Melton *v.* Pensacola Bank & Trust Co., 190 Fed. 126, 132, 111 C. C. A. 166 (1911).

116 This is the New York numbering for section 25 in the uniform draft.

117 See 19 Col. L. Rev. 222 on this feature of the case.

118 Producers' National Bank *v.* Elrod, 173 Pac. (Okla.) 659 (1918), annotated in L. R. A. 1918 F, 1018: "Failure of executory consideration for bill or note as affecting purchaser with knowledge of the character of the consideration."

119 N. I. L. § 56, codifies the common law.

120 *Ibid.*

121 Stevens *v.* Venema, 168 N. W. (Mich.) 531 (1918); annotated in L. R. A. 1918 F, 1148, "What circumstances are sufficient to put a purchaser of negotiable paper on inquiry;" also in 4 Iowa L. B. 283.

122 See L. R. A. 1918 F, 1163, "Right of one who takes commercial paper of corporation in payment for security for an individual debt of an officer."

In *Kelso* v. *Ellis* the purchaser knew much more than the existence of the contract. It had itself prevented performance by refusing to deliver the piano. The question for the jury was one of bad faith rather than of constructive notice to an honest purchaser.

"The relation between [B's] order for the piano to be shipped by the plaintiff to the defendants, and the notes of defendants payable to his order, would, we think, under the circumstances, sustain a finding that 'by the simple test of honesty and good faith' it became the duty of plaintiff to inquire as to the real situation between [B] and the defendants."

The remaining requirement that a holder in due course must purchase the paper before it is overdue or dishonored, will be treated separately below.

A defendant who sets up fraud or some other equity against an indorsee must also allege facts to show that the defendant is not a holder in due course. After the defendant has given evidence of his equity, the burden of coming forward with evidence of holding in due course rests on the plaintiff. However, the burden of establishing this issue by preponderance of evidence properly rests on the defendant, since he raises the issue by his affirmative defense. There was much confusion about this at common law, because of the ambiguity of the phrase "burden of proof," and the same conflict persists in the interpretation of these words as used in section 59 of the Negotiable Instruments Law. The Act is usually construed to throw both burdens on the indorsee,[123] and the same principle is applied if the victim of fraud sues him in replevin to recover the instrument,[124] or in equity to obtain its cancellation.[125] A few decisions within the past year adopt the correct view.[126]

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[123] See BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., 217. Recent cases are Metropolitan Discount Co. *v.* Baker, 97 S. E. (N. C.) 495 (1918); Atkins *v.* Brown, 208 S. W. (Mo. App.) 502 (1919); Gebby *v.* Carrillo, 177 Pac. (N. M.) 894 (1918); Schmidt *v.* Benedict, 178 Pac. (Kan.) 444 (1919); Security State Bank of Wichita *v.* Seaunier, 178 Pac. (Kan.) 239 (1919); Navajo-Apache Bank & Trust Co. *v.* Wakefield, 180 Pac. (Ariz.) 529 (1919).

[124] Thompson *v.* Clark, 178 Pac. (Okla.) 655 (1919).

[125] Lundean *v.* Hamilton, 169 N. W. (Iowa) 208; noted in 32 HARV. L. REV. 729.

[126] Downs *v.* Horton, 209 S. W. (Mo. App.) 595 (1919); noted in 88 CENT. L. J. 372, which fails to perceive the correct theory; Kenner *v.* Almon, 80 So. (Ala.) 449 (1918); Citizens' State Bank of Roundup *v.* Snelling, 178 Pac. (Mont.) 744 (1919).

Overdue and Dishonored Paper

In *Gould* v. *Svendsgaard*[127] the transferee of a note after maturity was held subject to a set-off by the maker against the payee, which was reduced to judgment after the transfer. The lower court had held, not without authority,[128] that the set-off had been merged in the judgment and could no longer be used, and that the judgment was not a defense because it was subsequent to the transfer. This unduly technical argument was wisely rejected, since merger should not work an injustice, and the judgment is but a new form of the old obligation. It is, of course, held in many jurisdictions that set-offs are not a defense to overdue paper in the hands of a transferee, but Minnesota permits them by statute.[129]

Paper is dishonored by failure to pay installments of principal, but not if interest is defaulted.[130] This may not be due to the existence of a defense but only to temporary embarrassment, and should therefore not put a purchaser on inquiry. Minnesota formerly held a contrary view, but this has been questioned in a recent decision.[131]

Cases on overdue checks are discussed later.

Extinguishment

The payment of a note by an indorser does not ordinarily extinguish it. There are two theories of the indorser's position. One regards him as a purchaser of the instrument, having the rights of an ordinary indorsee, except that he is subject to any equities which existed against him during a prior ownership. In other words, a defrauding payee cannot better himself by passing the instrument through a holder in due course. This theory finds strong support in cases which allow even a drawee[132] or an acceptor[133]

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[127] 170 N. W. (Minn.) 595 (1919); noted in 19 Col. L. Rev. 157; 47 Wash. L. Rep. 396.

[128] The cases cited in the opinion are divided.

[129] Gen. Stat. Minn. 1913, §§ 5870, 7675.

[130] A recent case is Merchants' Nat. Bank *v.* Smith, 96 S. E. (S. C.) 690 (1918). Fraser, J., dissenting.

[131] Lutgens *v.* Lutgens, 172 N. W. (Minn.) 893 (1919), *semble.*

[132] Swope *v.* Ross, 40 Pa. St. 186 (1861).

[133] Attenborough *v.* Mackenzie, 25 L. J. Ex. 244 (1856).

or a maker[134] to hold as purchaser, and was undoubtedly accepted by the common law even as to an anomalous or irregular indorser.[135] The other theory, in what is apparently a clumsy attempt to cover the exception above stated, holds that an indorser who pays is remitted to his former rights. This formulation takes care of the fraudulent payee, but it works great injustice to the anomalous indorser, because he had no "former rights" on the instrument. Yet this second view is apparently codified by section 121 of the Negotiable Instruments Law, though some cases have maintained the first view and allowed him to recover on the note from the accommodated maker.[136] It may be argued that it is immaterial whether he can recover on the instrument, since he can sue on an independent contract of reimbursement. Such a contract is, however, more difficult to prove, and often subject to a shorter Statute of Limitations.

Two recent analogous cases add some authority to the second view. In *Hurlburt* v. *Quigley*,[137] one of three joint and several accommodation indorsers was compelled to pay the note, and sued a co-indorser. The period of limitation was two years in any case, but if the suit was on the indorsement it had already run since maturity. The court held that this was an action for contribution, which accrued when the plaintiff paid, so that it was not yet barred. The court does not say that an action could not have been brought on the defendant's indorsement. In *Gregg* v. *Carroll*,[138] however, it was held that one of two joint payees could sue for contribution only on an implied promise and not on the note, so that he could not claim the benefit of the longer Statute of Limitations applicable to negotiable paper. On the other hand, one who guarantees the payment of an instrument by a separate contract has been held to take it as a purchaser when compelled to pay, and the statute runs from maturity.[139]

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134 See L. R. A. 1918 E, 170, "Effect of the reissue of a bill or note that has been paid by or transferred to a party primarily liable thereon."

135 See 28 HARV. L. R. 102.

136 See BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., 332, 333.

137 180 Pac. (Cal.) 613 (1919).

138 211 S. W. (Mo. App.) 914 (1919).

139 Leslie *v.* Compton, 103 Kan. 92, 172 Pac. 1015 (1918); annotated in L. R. A. 1918 F, 709, "Rights, as against principal debtor, of one who becomes surety or guarantor without his knowledge or consent."

By section 120 a person secondarily liable is discharged by any agreement to extend the time of payment unless the secondary party consents or a right against him is expressly reserved. Such a reservation was held to exist in a Tennessee case.[140] A bank held notes of a corporation payable to its own order and indorsed by individuals. At maturity one note was protested and protest on another was waived. The president of the bank became interested and gave the officers of the corporation cash to cover the notes with instructions not to have them cancelled or stamped paid, but to attach them as collateral for a new note of the corporation payable four months hence and given to the bank as payee. This was done, and subsequent renewals were made, the original notes always serving as collateral. Finally, the indorsers were sued on the original notes and held liable. Even though the bank might not have been able to sue the maker on these notes during the life of an outstanding renewal note, it could have sued the indorsers at any time, or they could have paid up at any time and sued the maker immediately.

Section 120 states other acts discharging a secondary party but fails to mention several defenses ordinarily available to sureties. Does this mean that a secondary party cannot set up such a defense? The cases are in serious conflict, but the correct view is that this section is not exclusive and that under section 196 cases not expressly governed by the Act fall under the law merchant, which includes the principles of suretyship.[141] The same principle applies to a primary party who is known to be a surety, though the section on the discharge of primary parties[142] does not state any suretyship defenses. Thus the failure of the holder to use ordinary care to preserve securities belonging to the principal bars recovery against the surety, in a recent case.[143] Such defenses are not available, however, against a holder ignorant of the suretyship, even on a non-negotiable instrument.[144]

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140 Hunter *v.* Matt Stewart Co., 213 S. W. (Tenn.) 918 (1919). *Accord*, National Park Bank of New York *v.* Koehler, 137 App. Div. 785, 122 N. Y. Supp. 490 (1910).

141 "Suretyship at 'Law Merchant,'" Anan Raymond, 30 HARV. L. REV. 141.

142 N. I. L., § 119.

143 Scandinavian American Bank of Fargo *v.* Westby, 172 N. W. (N. D.) 665 (1918).

144 Fletcher *v.* American National Bank, 123 N. E. (Ind.) 107 (1919), extension of time.

Checks and Banking

If a check is not presented within a reasonable time after its issue, the drawer is discharged from liability thereon to the extent of the loss caused by the delay.[145] He is also discharged to the same extent from the original debt.[146] The time allowed for presentation of a certified check is said to be longer since it is more suitable for circulation as a substitute for money because of its superior credit.[147] But even if the drawer of a check suffers no damage from delay, he can always set up the Statute of Limitations, which begins to run at the close of the next business day after issue, if under the circumstances that is the reasonable time for presentment.[148] A somewhat different question as to the effect of delay arises if a bill or note is payable at a bank, for here the ultimate payor is a primary party. The point has been recently annotated.[149]

What act of a drawee bank completes the payment of a check received by mail or through the clearing-house? There is much conflict in the cases whether stamping the check "paid" has that effect.[150] In *Hunt* v. *Security State Bank*[151] it appears that the drawee was accustomed to stamp all checks "paid" whether cashed over the counter or received by mail, and then place them on a spindle, where they were used thenceforth as "charge slips" and entered on the books against the depositor's account the same afternoon or next morning. While a check sent in for payment by draft was on the spindle stamped "paid" and before it was charged to his account, the depositor countermanded it. The drawee thereafter remitted the amount by draft to the collecting bank and charged the depositor. It was held that the depositor could recover the amount of the check, since payment was not completed. The bank was merely preparing to pay and had satisfied itself that the check was genuine and covered by sufficient funds. The case seems right, and even an entry to the depositor's account

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145 N. I. L., § 186.

146 McEwen *v.* Cobb, 104 Misc. 477, 172 N. Y. Supp. 44 (1918).

147 Smith *v.* Hubbard, 171 N. W. (Mich.) 546 (1919).

148 Colwell *v.* Colwell, 179 Pac. (Ore.) 916 (1919); noted in 33 Harv. L. Rev. 107.

149 2 A. L. R. 1381, "Who must bear loss of funds from failure of bank, at which bill or note is payable, during delay in presenting it."

150 See Brannan's Negotiable Instruments Law, 3 ed., references indexed *sub* "Paid." Brady on Checks, § 155.

151 179 Pac. (Ore.) 248 (1919).

might be revoked. Mailing a draft to the collecting bank, or crediting the holder's account on the books, or settling the clearing-house balance for the day should, however, be final. The stamping may be regarded as only a step. The transfer of funds seems the decisive matter in payment.

It should be noted that a bank's bookkeeping entries are not always irrevocable. A recent United States Supreme Court case [152] allowed a bank to set aside a transfer from one account to another induced by fraud.

The transfer of a check by indorsement was held in *National Market Co.* v. *Maryland Casualty Co.*[153] not to assign the original debt, and the indorsee was not allowed to enforce the contractor's bond of the drawer.

Many states make it criminal to issue a check without having sufficient money on deposit at time of issue. It has been held in Florida [154] that the drawer is not guilty if his deposit covers the check at the moment of issue, though he then has other checks outstanding which are subsequently charged against the deposit and exhaust it before the close of the day. The decision leaves a safe margin open for defrauders, and makes an amendment desirable. The cases construing such statutes are collected in a recent note.[155]

Foreign exchange is not strictly a part of the law of bills or notes, but it bears such a close relation to it in connection with banking, that mention should be made of a recent case in the New York Appellate Division,[156] which is discussed by the *Columbia Law Review* [157] in a note on the sale of foreign exchange. It is held, if a broker sells a "cable transfer," that is, agrees to order a foreign banker by cable to place money to the credit of the buyer of the exchange in a foreign city, and the broker becomes insolvent without cabling the transfer, that he holds the money paid in trust for the buyer. One judge dissented on the ground that the buyer had merely a contract right against the broker. "Foreign exchange . . . is commonly contracted for in the same

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[152] Harriman Nat. Bank *v.* Seldomridge, 39 Sup. Ct. Rep. 244 (1919).

[153] 100 Wash. 370, 174 Pac. 479 (1918), annotated in 1 A. L. R. 454.

[154] Wolfe *v.* State, 79 So. (Fla.) 449 (1918).

[155] L. R. A. 1918 F, 982.

[156] Legniti *v.* Mechanics and Metals National Bank, 173 N. Y. Supp. 814 (1919).

[157] 19 COL. L. REV. 322 (June, 1919).

manner and governed by the same laws as in the case of purchase of wheat, cotton, or any other subject of commerce." Certainly if the buyer had chosen a slower kind of exchange and bought a draft drawn by the seller upon the foreign banker, no trust would arise although the drawer failed and the drawee refused to accept or pay the draft. Moreover, the nature of the exchange business makes it highly inconvenient to retain deposits and credits as segregated trust items.

This abbreviated record of the litigation of a year makes it plain that the codification of a subject does not end its life. Some questions in bills and notes, like collateral acceptances, have been put out of the way by the statute; but others, like the anomalous indorser, rise from their graves to vex us, and new difficulties must ever come into existence with the rapid and multitudinous changes of methods for carrying on the business of the world.

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